YAP CHEE KONG

v.

CHAN BEE YEN

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 31-912-87]
10 OCTOBER 1988

FAMILY LAW: *Custody of child - Below 7 years - Duty of husband to provide matrimonial home - Wife left parents-in-law home - Wishes of unimpeachable parent considered - Welfare of child paramount consideration.*

This was an application by the applicant/defendant to set aside an *ex-parte* order whereby custody of the child was granted to the respondent/plaintiff who was the mother. The respondent had left her parents-in-laws' house and she took the child with her. The applicant took the child from school. The child was below 7 years at the material time. Both parties submitted that they were in a better position to look after the child.

Held:

[1] Although the welfare of the child was the paramount consideration, it was not the sole consideration. The wishes of the unimpeachable parent would prevail over the other. The wife was the unimpeachable parent as the husband had failed to provide a matrimonial home. It could not be said that the child would be uprooted if custody was given to the mother as she had taken the child with her when she left her parents-in-laws' home but her husband took the child back.

[Application dismissed.]

Case referred to:
Manickam v. Intheranee [1985] 1 MLJ 56

Legislation referred to:
Law Reform (Marriage & Divorce) Act 1976, s. 88(2), (3)

For the plaintiff - Ronnie Teo; M/s. Gibb & Co.
For the defendant - Lim Boon Seng; M/s. Lim Boon Seng & Co.

JUDGMENT

Peh Swee Chin J:

I granted custody to plaintiff, the mother of the infant born on 8 December 1981 (hereafter called the wife) and granted access to the defendant, the father, (hereafter called the husband), everyday from 7.00 p.m. to 9.00 p.m. but the husband was ordered to pay costs which followed the event.

The order granted by me took the form of my dismissing an application by the husband to set aside an earlier order dated 16 July 1987 obtained *ex-parte* by the wife granting an order in terms of the originating summons as filed herein. The *ex-parte* order was granted by a previous Ipoh Judge, the absence or otherwise of urgency and strong grounds for granting such an order, *ex-parte* was not an issue pressed in argument though the husband had mentioned that the certificate of urgency for the hearing *ex-parte* was an abuse of the

process. It has become largely immaterial because I have subsequently gone into the merits and confirmed the order and in any event, the order obtained *ex-parte* has never been complied with by the husband.

It would be necessary to refer to the background of this custody case. Both parties were married to each other on 18 May 1980 and thereafter, they stayed in a house belonging to the parents of the husband, with the said parents, and brother of the husband, among others.

The infant in question was born on 5 December 1981. The father was a tailor and the mother a cosmetician or cosmetics salesgirl earning about RM700 a month.

Relations between the wife and her parents-in-law, were very unhappy and this, according to the husband was mainly because the wife was jealous of his parents, the jealousy having allegedly stemmed from the infant's closeness to the infant's grandparents. The wife countered this by a denial of the same and accused the husband of failing even to provide a matrimonial home; of the husband's intolerable behaviour for failing allegedly to show love or affection; for ignoring her; for being argumentative when conversing with her and for his refusal even to share a room together with the wife from 18 February 1987 till 14 June 1987. She left the in-laws' home on 15 June 1987, a home that was shared by 10 persons. All these specific allegations were met with a mere denial.

The husband said that the infant had been very happy staying in the home of the in-laws. Photographs were exhibited to show a smiling and very happy child. The mother also, in return, exhibited similar photographs, showing also the infant to be beaming with delight.

The husband stated that while working as a tailor, his parents had been looking after the infant, showering him with a great deal of love and affection. The wife stated, while out working, that her sister could look after the child if custody was granted to her, so would her mother who helped presently her brother in the latter's "noodle" business, and stating that her mother would stay with her and the infant when she shifted to a flat she had bought.

The said in-laws' home was a brickhouse with modern sanitation and the husband said that the house where the wife presently stayed was a plank-walled house with the old-fashioned bucket system and were all in dirty condition. The wife however exhibited photos to show the inside of the house to be clean and that, recently, in obedience to the Municipal Council's directive, the bucket-system had been converted into the flush-system and that the plank walls had been renewed.

I interviewed the small boy in the absence of both parents of the boy and their Counsel after previous notice of my intention was indicated to Counsel. He said the husband loved him but the wife did not. He was angry with the wife (his mother) who had beaten him and that he preferred to stay with his father because other children in the house where his mother stayed also beat him. The statement of the child seemed to tally with the allegations of the father who said that the mother had beaten the child. The photos tendered by the wife seemed to suggest that the infant had got along well with the other children at the place where the wife presently stayed.

The boy also had a blood abnormality called "G6PS deficiency", which according to the exhibit to the affidavit of the father, would appear to be an excessive breaking-up of red blood cells which would in turn cause increased bilirubin which would deposit in various organs. It was stated that it would occur once in every 50 births and people affected with this could live to a ripe old age so long they avoided a number of drugs (list supplied) and all Chinese drugs and herbs, stating further, to quote:- "It is inherited as a sex-linked

recessive condition and (a woman will) pass it on to her sons only. The carrier state does not cause any problem usually." This would appear to suggest that the wife was a fellow-sufferer.

It is established law that the paramount consideration in a custody case is the welfare of the child, but this is not the sole consideration though it is predominant, thus, s. 88(2) and (3) of the Law Reform (Marriage & Divorce) Act 1976 state as follows:

> 88. (1) The Court may at any time by order place a child in the custody of his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the object of which include child welfare or to any other suitable person.
>
> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the Court shall have regard:
>
> (a) to the wishes of the parents of the child; and
>
> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.
>
> (3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

Further elaboration is required. Thus on the question of parents, the wishes of an unimpeachable parent prevail over those of the other subject to the said paramount consideration of welfare; please see *Manickam v. Intheranee* [1985] 1 MLJ 56.

As regards wishes of the child, I have not come across any case which decided at which age a male infant could exercise a choice. At common law, it seems that the age at which a child is deemed to have a discretion is 14 in the case of a boy and 16 in the case of a girl, as mentioned by Lindly LJ in *Thomasset v. Thomasset* [1894] pp. 295, 298 while referring to the choice of the infant for either of the parent. His Lordship came to the conclusion that age of discretion stated did not preclude the Court from exercising its jurisdiction it thought fit during the whole period of infancy despite the wishes of a child who had such age of discretion but, he added significantly "... I do not say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered in the custody of either parent against such child's own wishes". The case is some authority for saying that the wishes of a child who has attained years of discretion should normally be acceded to, but the same cannot be said in the case of a child below 7 years of age, as in the case of the infant in the instant case on the date of judgment. About the wishes of the infant in the instant case, I would have more to say later.

The rebuttable presumptions mentioned in the said sub-section 3 of s. 88 would also fall for consideration, having regard to the age of the child being under 7 at the time of judgment.

The questions of religion, and upbringing ought to be considered by the Court, but in this case the factors were evenly balanced on both sides, and it would not be necessary to comment on them further.

In my view, the paternal grandparents of the infant really loved the infant as they claimed, showering the infant with as much love as a grandparent could, however, more probably than not, they could have very often given in to the whims and fancies of the child to the extent of spoiling the child as could be even seen from the photographs, and on the facts of this case including the fact that infant was wither the only grandson of the husband's

parents or the only one staying with them. This excessive attention and show of affection would not equip very well the infant for later adult life, though I thought the grandparents were very well-meaning and kind, towards the infant.

Despite the scolding and occasional light corporal punishment of the child by the mother, more probably than not, I found that both the husband and wife loved the child, but the mother did so more than the husband, more probably than not as the husband appeared to have spent his spare time after his work not only in keeping the company of the infant, but also in indulging in his hobbies of cultivating Japanese miniature trees and rearing pet dogs. To the wife, her love for the infant now, since her separation from the husband and losing almost all that marriage stood for, could have intensified, and the child could have now represented the only meaningful thing in life to her, as her job as a cosmetician probably was merely one that gave a salary and hardly one of consuming passion.

As regards the change of residence consequent on the order of custody granted to the wife, there was one aspect which need to be stressed. The mother had been staying with the child, husband, and the said in-laws of the wife since the birth of the child until she left the house of the infant's grandparents in or about June 1988. She took the infant with her, but the father took the infant back from a school to which the wife had sent the infant. In other words, it was not a matter of the mother being away from the infant for some time and had suddenly come in from the cold to claim him. I did not think it would amount to a situation as grave as "uprooting" and any unhappy effects of such change of residence would be much more mercifully transient especially the daily access the Court later granted to the husband in respect of the infant. Please see the case of *Manickam v. Intheranee* of the Federal Court [1985] 1 MLJ 56, cited by Counsel.

About the wishes of the infant, he was under 7 years of age at the time of judgment and the Court could not ignore the provision of the rebuttable presumption that it would be good for him to be with his mother. Further, all this time, up to the date when I talked to him from the time when the wife left the in-laws' house in or about June 1988 with the prescience of the hearing the pending custody application, there would have been a certain amount of inevitable "brain-washing". The picture of his parents, I would not be surprised, to the infant could be one of kind father and stern mother, with the infant being totally unable at this tender age to know the difference between discipline and the sternness. I watched closely the infant when I talked to him also, and the impression of his being coached what to say could not be at all ruled out. In the circumstances, including especially the age of the child, I did not conclude that the child's opinion of preferring to stay with his father was an independent or reliable opinion.

About the two homes, while that of the paternal grandparents would appear to be more luxurious than that of the maternal grandmother, and this fact the husband had taken pains to emphasize in his affidavit, somewhat berating at the same time the comparative poverty of the maternal grandmother's home, nonetheless, I found from the photographs that the maternal grandmother's home was at least equally neat inside. Further, the wife had indeed booked a low-cost flat to which she would shift with the child and her mother. This should improve the situation for the wife further.

Regarding the blood abnormality which the infant was said to have, in view of its description, the mother could probably be affected similarly, and if this was so, other things being equal, the mother, having had to take care of herself by avoiding those drugs over the years could have more experience and been more knowledgeable than any of her in-laws or the husband. If she was not in fact similarly affected, she would be equally aware of the danger of those

drugs for which she appeared to have a list also, and then in such event, as between the husband and the wife, this factor of ensuring that the child kept clear of those drugs would be equally balanced.

The last factor I had to consider was the conduct of the parties bearing in mind the paramount consideration of the infant's welfare. While the wife complained of lack of any love or affection from the husband, both seemed to accuse each other of being hot-tempered. More probably than not, I found that a lot of their marital problems could have been avoided if the husband had provided a matrimonial home away from her in-laws. Apparently the home of the husband's parents was not regarded by her as such, and in my view for good reasons. She had to live with the relatives of the husband; this was bound to produce a great deal of tension and unhappiness. In my view the husband was certainly aware of the desirability to so stay away and any failure to take such step was conduct which was questionable and the wife's complaint on this score was entirely justifiable. The hot temper which the wife was said to have could equally be attributed to the husband, for both parties naturally exhibited it when they quarrelled with each other.

I ought to say a few words about the desirability, if not a necessity of a married couple staying away from the in-laws and living in a separate home. From my experience from the cases in Court, more marriages have gone on the rocks on the frequent underlying cause of not having a home of their own and therefore in living together with the in-laws than for any other causes, which, on reflection, would usually appear to have derived from that underlying cause. It is high time Courts regarded the failure of a husband to provide such a separate home, (which could even be a rented room), as a material ground when hearing claims for divorce, maintenance, and custody whenever such an issue is credibly raised and when such issue is relevant. In the instant case I found the complaint of the failure to provide a separate home for the wife having tipped the balance in favour of the wife when the Court considered the question whether the wife was an unimpeachable parent in this case.

In connection with the question of the separate home, expectations of women have changed dramatically with the increased and increasing awareness of their rights in society. Such awareness has been brought to Malaysia also by the winds of change that have blown in from the west, together with the motor cars, aeroplanes and the franchise to women, while women were prepared to live together with their in-laws at the beginning of this century or before the second world war, with equanimity and resignation, this position has largely ceased, if not completely, to exist. The Court's attitude to this question of a separate home should not remain immutable and must change with the times.

After considering all the circumstances bearing in mind constantly the predominant factor of the child's welfare, I granted the custody to the mother with daily access to the father for certain hours, for the benefit of the infant who might miss his father very much, and also to make the transitional period a very smooth one as far as possible.

Also found at [1989] 1 CLJ 262